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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 603

KENNETH D. ENGLAND AND CONNIE J. ENGLAND,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. 1b-21b) is reported at 226 F. Supp. 762. The opinion of the court of appeals (Pet. 1a-6a) is reported at 345 F. 2d 414.

JURISDICTION

The judgment of the court of appeals (Pet. 7a) was entered on April 29, 1965. On July 14, 1965, Mr.

Justice Clark extended the time for filing a petition for a writ of certiorari to September 24, 1965. The petition for a writ of certiorari was filed on September 23, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that amounts paid to petitioner by his employer to defray certain personal living expenses incurred by petitioner subsequent to his arrival at a new post of duty were taxable income.

2. Assuming that these amounts are includible in petitioner's gross income, whether he is entitled to deduct his corresponding expenditures as ordinary and necessary business expenses.

STATUTES AND OTHER AUTHORITIES INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954 and the relevant Revenue Rulings are set forth in the Appendix, *infra*, pp. 14-18.

STATEMENT

Petitioner [1] had been employed by Aetna Casualty and Surety Company at its Kansas City, Missouri, office for a period of seven years prior to 1960. In June 1960 Aetna transferred petitioner to Springfield, Illinois. He arrived in Springfield on June 19, 1960, and commenced work there the next day.

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[1] Connie J. England, petitioner's wife, is a party to these proceedings because a joint return was filed.

Pursuant to its established policy, Aetna reimbursed petitioner (1) for the cost of transporting himself, his wife and his belongings from Kansas City to Springfield and (2) for certain personal expenses incurred by petitioner after his arrival in Springfield. Petitioner did not report any of the reimbursement as income in his 1960 tax return. The Commissioner did not attempt to tax petitioner on the first category of reimbursements—*i.e.*, the cost of transporting himself, his family and belongings from the old to the new post of duty. The present case concerns the Commissioner's attempt to tax the second category of reimbursements—*i.e.*, expenses incurred by petitioner after arrival in Springfield but before moving into his new house, totalling $446—including the following (Pet. 4b, fn. 1):

(1). Meals and lodging for the period June 19 to August 1, 1960.

(2). Laundry and cleaning expense for the period June 19 to August 1, 1960.

(3). Telegram from Springfield to Kansas City confirming the sale of petitioner's house.

(4). Newspaper advertisement seeking to rent a house in Springfield.

(5). Dinner and entertainment for the employee petitioner replaced.

(6). Petitioner's wife's trip from Kansas City to Springfield to inspect prospective homes.

(7). Boarding of petitioner's dog and cat.

(8). Cost of bringing title to date on petitioner's house

(9). Revenue stamp.

Petitioner paid the tax under protest and brought the present suit for refund. The district court decided in favor of petitioner; the court of appeals reversed (Pet. 1a-6a, 1b-16b).

ARGUMENT

The decision of the court below is correct; it does not conflict with any other appellate decision; and there is no need for further review by this Court.

1. The Commissioner long ago made a careful examination of the questions presented here—whether an employee who, at the request of his employer, moves from one city to another receives taxable income if the employer reimburses him for expenses incurred in connection with the move, and, if so, whether the employee is entitled to claim an offsetting deduction by treating the costs that were reimbursed as deductible business expenses. The Commissioner concluded that any amounts received by an employee as reimbursement for the expenses of moving himself, his family and his belongings from one post of duty to another, including the cost of meals and lodging in transit (herein referred to as direct moving expenses), do not constitute taxable income to the employee, but that amounts received as reimbursement for other expenses related to the move do constitute income to the employee, and that no offsetting deduction is allowable. Rev. Rul. 54-429, 1954-2 Cum. Bull. 53 (App., *infra*, pp. 15-18); see also, Rev. Rul. 64-153, 1964-1 Cum. Bull. (Part 1) 70; Rev. Rul. 65-158, 1965-1 Cum. Bull. 34.

We believe that the line drawn by these rulings—*i.e.*, excluding from income amounts received as reimbursement for direct moving expenses but including in income amounts received as reimbursement for the many other indirect expenses occasioned by the move—represents a reasonable and practical resolution of a difficult administrative problem. The rulings reflect an accommodation between two basic principles of the Code. On the one hand, an employee should not have to pay tax on an expenditure by his employer which primarily benefits the employer. On the other hand, the employee should pay a tax on any expenditure by the employer which primarily benefits the employee personally.[2] As discussed *infra*, p. 9, every appellate court to consider the question has accepted the Commissioner's long-standing position.

The indirect expenses associated with moving are subject to great variation, depending on the personal preferences of the employee and the generosity of the employer. For example, one employee may, solely because of the move, feel constrained to hire domestic help to aid in packing, unpacking and getting settled; another employee may think that the new house requires a different style of drapes, rugs, and furnishings than his old house; a third may insist

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[2] It makes no difference whether the employer pays the expense directly or reimburses the employee who has paid the expense. For example, if an employee runs up a $100 personal grocery bill, the employee will be taxed on $100 of income regardless of whether the employer pays the grocer or reimburses the employee who has paid the grocer.

on new wallpaper and chandeliers. Of course, all of these decisions will depend on the employee's personal tastes and desires; none can be regarded as primarily for his employer's convenience, even though incurred solely as a result of the move which his employer required him to make.[3]

Congress expressly prohibited taxpayers from deducting any "personal, living, or family expenses" (1954 Code, § 262), and it is quite clear that it did not intend this provision to be circumscribed by having an employee exclude from his income reimbursements for personal expenses, even though the personal expenditure was required by the taxpayer's employer and essential to retaining his employment. For example, a given corporation may require its salesmen or executives to don a clean shirt every day, to wear expensive suits, to drive a certain make of automobile, or to live in a certain fashionable suburb. Even though the employee proves that but for his employer's requirements he would not have spent as much on his clothes, car or home, no part of these costs is deductible. Although expenditures of this kind may be helpful in furthering the taxpayer's business (of being an employee) and he may have made them primarily for business rather than personal reasons, the relationship between the ex-

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[3] For example, in the instant case petitioner was reimbursed for, *inter alia*, expenditures for meals, lodging and laundry from the time he moved to Springfield, his new post of duty, until the house of his choice was ready for occupancy, the cost of boarding his dog and cat, and certain entertainment expenses.

penditure and the taxpayer's business is too intangible and remote to qualify them as deductible business expenses. In the end, they are more accurately described as "personal, living, or family expenses" which the Code specifically makes non-deductible. 1954 Code, § 262. Moreover, if, instead of paying the employee a gross salary, the employer segregates monthly compensation into clothes reimbursement, automobile reimbursement, home reimbursement, and labels only the remainder as salary, the entire amount will nevertheless remain taxable.

Similarly, if an employee is reimbursed for essentially personal expenses connected with his move, the reimbursement is not excludible from income merely because the expense would not have been incurred but for the move. Petitioner's argument, based as it is on the fact that the move was employer-directed, thus focuses on the wrong question. An employer may pay a particular employee a bonus in order to induce him to move, but the bonus would nevertheless be taxable income. The same result holds true if, in order to induce an employee to remain in his employ and to make the desired move, an employer pays some of the employee's personal expenses.

Section 61(a) of the Code defines gross income as including "all income from whatever source derived * * *." This definition was intended by Congress to be "all-inclusive" (*Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 432) and is clearly broad enough in scope to embrace amounts paid by an employer to reimburse his employee for personal living expenses

occasioned by the employee's transfer from one post of duty to another. The only substantial question is whether the Commissioner and the courts must scrutinize each reimbursed expenditure to ascertain whether it is essentially intended to benefit the employer (other than by inducing the employee to continue working for him—as do all salary payments) or whether it is essentially intended to reimburse the employee for personal, living or family expenses.

Petitioner and the briefs of *amici curiae* point out that various large American companies who move hundreds of thousands of their employees annually reimburse them for varying amounts of indirect moving expenses. Obviously, a very heavy administrative and judicial burden would be imposed if it became necessary to examine each reimbursed expenditure and to weigh its respective business and personal aspects. The matter is one which is peculiarly appropriate for exercise of the rule-making power, and we submit that the Commissioner validly exercised his authority in establishing the long-standing rule that only the direct expenses of moving to a new post of duty—*i.e.*, the cost of transporting the employee, his family and his belongings, including the cost of meals and lodging in transit—will be excluded from an employee's income, and that any reimbursement of the innumerable types of indirect expenses—depending as they do on the employee's personal tastes and the employer's generosity—will constitute income. Since the rule is both reasonable and workable, the court below correctly rejected peti-

tioner's argument that the Commissioner and the courts must make an individual examination of the facts of each employee's particular case to determine whether each expenditure related to the move primarily benefitted the employer or the moving employee.

2. Every appellate court that has considered the proper tax treatment of indirect moving expenses has held that they constitute non-deductible personal, living, or family expenses, and that any reimbursement received with respect to such expenses is includible in income. In fact, every principle announced in Revenue Ruling 54-429 has now been tested and upheld by at least two courts of appeals. See *York* v. *Commissioner*, 160 F. 2d 385 (C.A.D.C.); *Commissioner* v. *Mendel*, C.A. 4, No. 9904, decided October 8, 1965; *United States* v. *Woodall*, 255 F. 2d 370 (C.A. 10); *Koons* v. *United States*, 315 F. 2d 542 (C.A. 9); *Light* v. *Commissioner*, 310 F. 2d 716 (C.A. 5). See also *Bradley* v. *Commissioner*, 324 F. 2d 610 (C.A. 4). The only contrary precedent, the Tax Court's decision in *Cavanagh* v. *Commissioner*, 36 T.C. 300, was ignored by the Court of Appeals for the Fifth Circuit in *Light* v. *Commissioner*, *supra* (although called to that court's attention); questioned by the Court of Appeals for the Fourth Circuit in *Commissioner* v. *Mendel*, *supra*; and specifically disapproved by the Seventh Circuit in the instant case. There is thus no conflicting appellate decision.

3. Moreover, Congress recently considered the deductibility of moving expenses and explicitly approved the Commissioner's traditional approach. As explained above, the Commissioner had ruled that an

employee's reimbursement for his direct moving expenses (transportation of himself, his family and his belongings, and meals and lodging en route) does not constitute taxable income. However, the Commissioner had denied deductions to employees who paid their own moving expenses (and received no reimbursement). In order to equalize the tax treatment between employees who paid their own moving expenses and those who were reimbursed, Congress added § 217 to the Code in 1964. That section permits an employee to deduct his costs "of moving household goods and personal effects from the former residence to the new residence and * * * of traveling (including meals and lodging) from the former residence to the new place of residence." The Committee Reports make it clear beyond doubt that the section does not permit any deduction for indirect moving expenses of the type here in issue:

> * * * Expenses of traveling do not include living expenses following the date of arrival at the new place of residence, living expenses preceding the date of departure for the new place of residence, expenses of house or apartment hunting, or expenses of trips for purposes of selling property. [H. Rep. No. 749, 88th Cong., 1st Sess., p. A58.]

To be sure, Congress was dealing only with the deductibility of moving expenses and the exclusion of reimbursed expenses from income was "left for judicial interpretation." H. Rep. No. 749, 88th Cong., 1st Sess., p. 59. However, the reasons that prompted the enactment of § 217 show that petitioner's argument in the instant case does not square with the

principles governing moving expenses in post-1964 years. Had petitioner's argument been accepted by the court of appeals, the very discrimination which Congress sought to eliminate by the enactment of § 217 would have been recreated.[4]

4. Petitioner asserts (Pet. 16) that there is a conflict in views among the courts of appeals with respect to the meaning of the word "home" in Section 162(a)(2)'s provision for the deduction of "traveling expenses * * * while away from home in the pursuit of a trade or business * * *." However, the reimbursed expenses here in issue were not traveling expenses and thus the meaning of the word "home" is not presented by this case.

Section 162(a)(2) is limited to those who travel temporarily to other areas, and such controversy as exists among the courts of appeals concerns the identification of the "home" of employees who are forced

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[4] The brief filed by the Associated Industries of New York State, Inc., as *amicus curiae*, discusses H.R. 10607, 89th Cong., 1st Sess., (favorably reported by the House Committee on Government Operations on October 21, 1965, H. Rep. No. 1199, 89th Cong., 1st Sess.). That bill, if enacted into law, will provide government employees with reimbursement for living expenses occasioned by their transfer from one post to another but does not affect the tax treatment of such reimbursements. See Rev. Rul. 64-153, 1964-1 Cum. Bull. (Part 1) 70. Indeed, the present Congressional consideration being accorded to expenses of transferred government employees, as well as Congress' recent enactment of Section 217 of the Internal Revenue Code, would suggest that Congress, rather than the courts, is the appropriate forum to initiate a change in the tax treatment of reimbursed living expenses.

to do a great deal of *temporary* travel.[5] In this case it is conceded that petitioner was "permanently transferred" (Pet. 4). Accordingly, the expenses are not "traveling expenses * * * while away from home" but living expenses occasioned by the change of petitioner's home. There is no conflict of decisions between the court below and any other court of appeals concerning the deductibility of the expenses at issue.[6]

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[5] Of the three cases cited by petitioner (Pet. 16, fns. 31, 32) as creating a conflict, all involved the problem of identifying the "home" of an individual whose occupation required extensive but temporary travel. *Burns* v. *Gray*, 287 F. 2d 698 (C.A. 6), involved a racehorse starter and racing official; *Wright* v. *Hartsell*, 305 F. 2d 221 (C.A. 9), involved a construction worker; and *Wallace* v. *Commissioner*, 144 F. 2d 407 (C.A. 9), involved a movie actress. None of these cases concerns the type of living expenses incident to a transfer that is involved here.

[6] We note that none of the three cases claimed by petitioner to conflict with the lower court's decision was relied upon by him in the court below or cited to that court.

CONCLUSION

The decision of the court of appeals is correct. It is in accord with the Commissioner's long-standing and reasonable administrative rulings which have been uniformly accepted by every federal appellate court to consider them and utilized by Congress in providing for the post-1964 deductibility of moving expenses. The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

RICHARD M. ROBERTS,
Acting Assistant Attorney General.

I. HENRY KUTZ,
FRED R. BECKER,
Attorneys.

DECEMBER 1965.

APPENDIX

Internal Revenue Code of 1954:

SEC. 61. GROSS INCOME DEFINED.

(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

* * * *

[26 U.S.C. 61.]

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

* * * *

(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business; and

* * * *

[26 U.S.C. 162.]

SEC. 217 [as added by Sec. 213(a)(1), Revenue Act of 1964, P.L. 88-272, 78 Stat. 19, 50-51]. MOVING EXPENSES.

(a) *Deduction Allowed.*—There shall be allowed as a deduction moving expenses paid or incurred during the taxable year in connection with the commencement of work by the taxpayer as an employee at a new principal place of work.

(b) *Definition of Moving Expenses.*—

(1) *In general.*—For purposes of this section, the term "moving expenses" means only the reasonable expenses—

(A) of moving household goods and personal effects from the former residence to the new residence, and

(B) of traveling (including meals and lodging) from the former residence to the new place of residence.

* * * *

[26 U.S.C. 217.]

SEC. 262. PERSONAL, LIVING, AND FAMILY EXPENSES.

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

[26 U.S.C. 262.]

Rev. Rul. 54-429, 1954-2 Cum. Bull. 53:

Regulations 118, Section 39.22(a)-2: Compensation for personal services. (Also Section 24 (a), Section 39.24(a)-1.)

Where an employee is transferred in the interest of his employer from one official station to another for permanent duty, the allowance or reimbursement received for moving himself, his immediate family, household goods and personal effects is not includible in the gross income of the employee if the total amount of the reimbursement or allowance is expended for such purpose. Any excess of the allowance or reim-

bursement over the actual expenses incurred for such purpose is includible in his gross income. Any moving expenses paid or incurred by the employee in excess of the allowance or reimbursement is not deductible for Federal income tax purposes.

O.D. 1135, C.B. 5, 174 (1921) and I.T. 3022, C.B. XV-2, 76 (1936), modified.

Reconsideration has been given to the position of the Internal Revenue Service relative to the treatment, for Federal income tax purposes, of amounts received by an employee, representing allowances or reimbursements for moving himself, his immediate family, household goods and personal effects, in the case of a transfer, in the interest of his employer, from one official station to another for permanent duty.

O.D. 1135, C.B. 5, 174 (1921), holds that transportation charges paid by the Government on account of the transportation of the families of Army officers are in the nature of additional compensation and as such must be included in gross income. I.T. 3022, C.B. XV-2, 76 (1936), similarly holds that the cost of transportation of dependents of officers and enlisted men of the Coast Guard which is paid by the Government must be reported as taxable income, and no deduction therefor may be allowed in computing net income. However, in G.C.M. 18430, C.B. 1937-1, 137, it is held that where an employee of the State Department is transferred from one foreign post of duty to another for the convenience of the Government, the amount received by him as reimbursement of cost of transportation for himself and family should not be included in gross income.

Section 22(a) of the Internal Revenue Code of 1939 provides in part as follows:

> *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid * * *.

The payment or reimbursement by an employer of the cost of moving an employee, his immediate family, household goods, and personal effects from one place of employment to another permanent place of employment, primarily for the benefit of the employer, is not compensatory in nature. There is no essential difference between a payment of such cost directly by the employer and the payment by the employee and subsequent reimbursement by the employer.

Accordingly, it is concluded that (1) amounts received by an employee from his employer representing allowances or reimbursements for moving himself, his immediate family, household goods and personal effects, in case of a transfer in the interest of his employer, from one official station to another for permanent duty, do not represent compensation within the meaning of section 22(a) of the Code, and are not includible in the gross income of the employee if the total amount of the reimbursement or allowance is expended for such purposes; (2) any excess of the allowances or reimbursements over the actual expenses incurred is includible in the employee's gross income; and (3) any moving expenses paid or incurred by the employee in excess of the allowances or reimbursements are not deductible for Federal income tax purposes, since they rep-

resent personal, living or family expenses within the meaning of section 24(a) of the Code. In any case in which the transfer is made primarily for the benefit of the employee, any allowance or reimbursement received by the employee is includible in his gross income.

Amounts received as allowances or reimbursements for meals and lodging of the employee and his family while awaiting permanent quarters at the new post of duty are includible in gross income of the employee.

O.D. 1135, C.B. 5, 174 (1921), and I.T. 3022, C.B. XV-2, 76 (1936), are modified to the extent that they are inconsistent with the views expressed herein.

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